85-1525

Supreme Court, U.S.
FILED
MAR 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No:_____

IN THE

SUPREME COURT OF THE UNITED STATES

January Term

CHARLES EDWARD HARTMAN
Appellant

vs.

STATE OF TENNESSEE
Appellee

On Petition for Writ of Certiorari from the
Supreme Court of Tennessee No: 84-6-I

PETITION FOR WRIT OF CERTIORARI

DALE QUILLEN
Attorney for appellant
Suite 208, Cavalier Building
95 White Bridge Road
Nashville, Tennessee 37205
(615) 356-1580

6012

TABLE OF CONTENTS

Table of Authorities 2

Reference to Opinion Below 4

Statement of Jurisdiction 4

Constitutional and Statutory Provisions 4-12

Statement of the Case 13-20

Argument 21-24

Certificate of Service 25

Appendix 26-59

TABLE OF AUTHORITIES

Caldwell v. Mississippi, ____ U.S. ____, 105 S.Ct. 2633 (1985)

Eddings v. Oklahoma, 455 U.S. 112, 102 S.Ct. 869 (1982)

Gregg v. Georgia, 428 U.S. 153 (1976)

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973

State v. Teague, ____ U.S. ____, 105 S.Ct. 3538, 3539 (1985)

Woodson v. North Carolina, 428 U.S. 280 (1976)

QUESTION PRESENTED FOR REVIEW

DOES THE TENNESSEE CAPITAL PUNISHMENT STATUTE VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY PRECLUDING THE SENTENCER FROM CONSIDERATION OF MITIGATING FACTORS.

REFERENCE TO OPINION BELOW

The defendant's conviction and sentence of death was affirmed by the Supreme Court of Tennessee in Case No: 84-6-I, by Opinion filed October 28, 1985. A Petition to Rehear was timely filed and denied by Opinion filed January 13, 1986. These Opinions are incorporated in the Appendix to this Petition for Writ of Certiorari.

STATEMENT OF JURSIDICTION

On October 28, 1985, the Supreme Court of Tennessee affirmed the conviction of Charles Edward Hartman for murder in the first degree and the sentence of death imposed. A Petition to Rehear was filed and the Petition to Rehear was denied by Opinion filed January 13, 1986. The appellant seeks review in the Supreme Court by Writ of Certiorari pursuant to 28 U.S.C., Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT 8

> "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual treatment inflicted."

UNITED STATES CONSTITUTION, AMENDMENT 14

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction equal protection of the laws."

TENNESSEE CODE ANNOTATED, SECTION 39-2-203

Sentencing for first-degree murder.—
(a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment.
(b) In the sentencing proceeding, the attorney for the state shall be allowed to make an opening statement to the jury and then the attorney for the defendant shall also be allowed such statement, provided that the waiver of opening statement by one party shall not preclude the opening statement by the other party.
(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the

defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(d) In the sentencing proceedings, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

(e) After closing aruments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both. These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations.

(f) If the jury unanimously determines that no statutory aggravating circumstances have

been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. The jury shall then return its verdict to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF LIFE IMPRISONMENT

(1) We, the jury, unanimously find that the punishment shall be life imprisonment.

/s/ _____ Jury Foreman	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not out-

weighed by any mitigating circumstances, the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall:

(1) Reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found; and

(2) Signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found. These findings and verdict shall be returned to the judge upon a form provided by the court wich may appear substantially as follows:

PUNISHMENT OF DEATH

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

[Here list the statutory aggravating circumstance or circumstances so found]

(2) We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we, the jury, unanimously find that the punishment shall be death.

/s/ _____
Jury Foreman

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

/s/ _____ /s/ _____
Juror Juror

/s/ _____ /s/ _____
Juror Juror

(h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

(1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older;

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during his act of murder;

(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration;

(5) The murder was especially heinous, atrocious, cruel in that it involved torture or

depravity of mind;
(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;
(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;
(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement;
(9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties;
(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office;
(11) The murder was committed against a

national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official; and

(12) The defendant committed "mass murder" which is defined as the murder of three or more persons within the state of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan.

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime; and

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to

conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

(k) Upon motion for a new trial, after a conviction of first degree murder, if the court finds error in the trial determining guilt, a new trial on both guilt and sentencing shall be held, but if the court finds error alone in the trial determining punishment, a new trial on the issue of punishment alone shall be held by a new jury empanelled for said purpose. In the event that the trial court, or any other court with jurisdiction to do so, orders that a defendant convicted of first-degree murder (whether the sentence is death or life imprisonment) be granted a new trial, either as to guilt or punishment or both, said new trial shall include the possible punishments of death or life imprisonment.

STATEMENT OF THE CASE

CHARLES EDWARD HARTMAN was indicted by the Montgomery County, Tennessee, Grand Jury for the November, 1981, death of a sixteen year old girl.

Kathy Nishiyama picked up her boyfriend, David Lin, at school, and spent the afternoon of November 16, 1981, with him. At 4:00 o'clock or 4:30 Kathy Nishiyama and David Lin left the Lin residence and returned to Clarksville to the Golden Cue on Riverside Drive where they met David's brother, Michael Lin, and his friend, Steve Campbell.

Kathy Nishiyama called home between 4:30 and 5:00 o'clock leaving a note to tell her father that she was in town and would be home by 10:00 o'clock. Kathy and David returned to the Lin residence approximately 6:00 o'clock or 6:30, parked down the rural road for an hour or more, drove to the store and returned to the Lin residence at 8:00 or 8:15. The couple talked for ten or fifteen minutes and Kathy left at 8:30.

Ten to fifteen minutes after Kathy Nishiyama left, Michael Lin left the residence.

At 9:30 David Lin called the Nishiyama home but Kathy had not yet arrived; at 10:00 he called again.

Kathy Nishiyama's mother, Gabrilene Nishiyama, called the Lin home shortly thereafter and talked with Patricia Lin. Her son had already left; Mrs. Nishiyama then called the Golden Cue and spoke with David. David Lin located Kathy's car in a parking lot at the intersection of Lafayette and 41-A in Clarksville, within two miles of her home. The car was parked on the left side of the road in a parking lot, facing in the opposite direction from the Nishiyama home. Lin testified that he left a note on her car at about 11:00 that night. David Lin drove to

Indoor Amusements looking for Kathy and then to the Nishiyama residence, arriving at midnight.

Ralph Nishiyama accompanied David Lin to the intersection of 41-A and Lafayette. He opened the door of his daughter's car where he testified he saw her school books and a sweater, but not her purse.

Officer Allen Oakes of the Clarksville Police Department went to the intersection of Lafayette and 41-A to check the vehicle shortly after midnight. Ralph Nishiyama opened the car door, and Allen Oakes examined the car. Allen Oakes saw in the vehicle a purse that was like the one that belonged to Kathy Nishiyama. Allen Oakes did not see a note when he examined the car at midnight, but he did see the note there at 7:30 in the morning.

There were no signs of a struggle around the vehicle.

Clarksville Police Officer Milam Lewis noticed the vehicle parked at 41-A and Lafayette and pulled in behind the car at approximately 11:00 o'clock. After a conversation with David Lin and his sister, Deborah, Milam Lewis left the parking lot, instructing David Lin to have the Nishiyamas call the Police Department. Milam Lewis saw David Lin again at midnight to 12:30.

At sometime before 10:00 o'clock on the night of November 16, 1981, Jackie Ross Jackson testified that he drove up 41-A and observed for three to five seconds a male, white facing the small dark car in a parking lot. He also observed a car that looked like a Montgomery County patrol car.

On November 16, 1981, Carol Estes testified that she observed a car stopped by a police officer at 41-A and Lafayette on the opposite side of the road from the place where Kathy Nishiyama's car was found. Estes testified that she left her home

after the television show "Quincy" ended; the show was televised from 11:00 o'clock to midnight on November 16, 1981.

Detective Roger Meckley of the Clarksville Police Department testified that he observed a county patrol car entering Clarksville, at 9:15 on the night of November 16, 1981. Fifteen minutes later he saw the same patrol car pass, headed in the opposite direction out of town on Highway 48, driven by a white male with shoulder length brown hair, wearing a green jacket.

Officer Allen Oakes testified that he observed an out-of-county patrol car leaving Clarksville between 9:00 and 9:30 on November 16, 1981.

Eddie Hartman was a trusty at the Dickson County Jail in November, 1981.

According to statements made by Eddie Hartman and admitted into evidence, at approximately 5:30 on the evening of November 16, 1981, Deputy Carroll Fiser of the Dickson County Sheriff's Department asked Eddie Hartman to drive him to his tobacco barn. In returning to Charlotte between 6:00 and 6:30 the next morning Hartman stated to both Kenneth Atkins, District Attorney General for the 21st Judicial Circuit, and F.B.I. Agent John Cox that he had stopped two men to inquire of directions to Charlotte. Richard Hughes testified that Hartman stopped him between 6:00 and 6:30, Terry Taylor was stopped by Hartman at approximately 7:00 o'clock. At sometime after 7:00 and before 7:30 Betty Smith and her daughter were stopped by Eddie Hartman.

The defendant's statements admitted into evidence indicated that he had gotten the patrol car stuck in a creek.

Jimmy Dale Riggs and his wife lived on Statton Road in rural Dickson County, two miles off High-

way 48 on November 16, 1981. The defendant came to their door at 1:30 to 2:00 o'clock in the morning claiming to be stuck in Big Barton's Creek. The defendant asked the Riggs for help to pull his car out of the creek.

On March 1, 1982, a purse was discovered by the side of the road in Stewart County, Tennessee. The contents discarded by the road identified it as that of Kathy Nishiyama. The remains of the girl's body were found scattered off a logging road in Houston County a short time later. She had been killed by four blows with a blunt instrument to the head. There was evidence that a rope had been tied to two trees between which the major portion of the remains lay.

Ravin Frazier, an inmate at the Tennessee State Penitentiary, serving a sentence for aiding and abetting second degree murder out of Montgomery County, Tennessee, testified that Eddie Hartman had made the following statement to him:

> "He put the lights on her and told her that there had been a sickness in her family, lock her car up and get in and come on and go with him and he would take her down there.
>
> I got in the backseat...I pulled her out of the car and then did it again...He said that he pulled her out of the car and killed her and did it again."

Patrol car #5 which Eddie Hartman was driving has a wire screen between the front and back seats. The doors do not open from the interior of the car and the windows do not roll down.

Deputy Ray Jackson of Dickson County observed the car at 6:30 on the morning of November 17, 1981, and saw no blood on the vehicle only mud.

There was no blood on the interior of the car. The State offered no additional proof at the sentencing hearing, but relied upon the three aggravating circumstances in seeking the death penalty:

(1) That the murder was especially heinous, atrocious or cruel in that in involved torture or depravity of mind;

(2) That the murder was committed while the defendant was engaged in kidnapping;

(3) That the murder was committed by the defendant while he was in lawful custody or in a lawful place of confinement or during his escape from lawful custody.

The defendant tendered the testimony of a former investigator who confirmed the defendant's alibi and Nancy Liehr, a friend of the victim that she had seen Kathy Nishiyama's car driven by a girl who looked like Kathy, heading north toward the parking lot where the car was found at 9:30 or 9:40 on the evening of November 16th. (This information was withheld from the defense until the conclusion of the trial). This observation was inconsistent with the defendant's guilt in that the State's proof showed the Dickson County Patrol car **leaving** the Clarksville area at 9:15 to 9:30, after Kathy was seen near her home. The defendant tendered the testimony of these witnesses in support of his innocence, maintaining that his innocence was a mitigating factor and that proof of the nature and circumstances of the offense consistent with innocence were admissable at the sentencing hearing. The trial judge precluded the evidence as irrelevant to sentencing.

The defendant's wife, Deborah Ann Hartman, testified that the defendant was a good husband and a good father to their two small children.

The Trial Judge charged the jury as follows:

"No death penalty shall be imposed unless you find unanimously that one or more of the following specified statutory aggravating circumstances have been proven on the trial and/or on the sentencing hearing, beyond a reasonable doubt:

(1) That the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind.

(2) The murder was committed while the defendant was engaged in committing or was an accomplice in the commission of or was attempting to commit or was fleeing after committing or attempting to commit kidnapping. Kidnapping is the offense of forcefully or unlawfully confining, invading, or enticing away another, with intent of causing him to be secretly confined or imprisoned against his will. The offense of kidnapping any person for the purpose of securing some other valuable thing.

(3) The murder was committed by the defendant while he was in lawful custody or place of lawful confinement or during his escape from lawful custody or from the place of lawful confinement.

In arriving at the punishment, the jury shall consider, as heretofore indicated, any mitigating circumstances, which shall include, but not be limited to the following:

And that is any fact or circumstance that you find is mitigating."

After deliberating two hours and five minutes the jury announced that it was ready with the verdict and announced an unanimous finding that there

were three aggravating circumstances and no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstances. The jury imposed the punishment required by the statute, death.

The appellant first challenged the Court's instruction by Motion for New Trial in the Criminal Court of Montgomery County, Tennessee. The Trial Court denied his Motion for New Trial, and, on appeal to the Supreme Court for Tennessee the issue was presented by Brief and on Petition to Rehear. The Supreme Court addressed the issue in its Opinion of October 28, 1985, stating:

> "Assuming, without deciding, that there were non-statutory mitigating circumstances raised by the evidence, we find no provision in the death penalty statutes requiring that such factors be expressly charged. The only thing in the statutes relevant to defendant's contention under discussion is that mitigating circumstances are not limited to those expressly listed therein. T.C.A., Section 39-2-203(j). Accordingly, we have held that the jury may consider any non-statutory mitigating circumstances, on its own initiative, and that there is no requirement that they reveal in their verdict what mitigating circumstances, if any, were considered. **State v. Melson**, 638 S.W.2d 342, 368 (Tenn. 1982). Therefore, we hold that the only mandatory instructions with respect to mitigating circumstances are that those statutory circumstances which are raised by the evidence shall be expressly charged, and the jury must be told that they shall weigh and consider any other facts or cir-

> cumstances that are raised by the evidence that they find to be mitigating circumstances, in making the determination of which circumstances, aggravating or mitigating, outweigh the other."

The Petition to Rehear was, "found to be without merit, and is respectfully denied.

ARGUMENT

I.

DOES THE TENNESSEE CAPITAL PUNISHMENT STATUTE VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY PRECLUDING THE SENTENCER FROM CONSIDERATION OF MITIGATING FACTORS.

The Tennessee Supreme Court has affirmed the imposition of a sentence of death where the trial court both excluded from evidence at the sentencing hearing evidence of the circumstances of the offense and failed to charge the jury to consider specific mitigating circumstances which were in evidence.

The court's refusal to charge the jury the mitigating circumstances raised by the proof precluded the jury from considering this aspect of the defendant's character or record as a basis for sentence less than death in clear violation of the standards set forth in **Lockett v. Ohio**, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

By affirming the death sentence of CHARLES EDWARD HARTMAN by a jury which was not charged to consider the defendant's individual character and record in mitigation, the Tennessee Supreme Court permits the arbitrary imposition of this ultimate sanction in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States. This Court has repeatedly held in capital cases, "That the sentencer...not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record in any of the circumstances of the offense that the defendant proferred as a basis for a sentence less than death." **Lockett v. Ohio**, 438 U.S. 586, 98 S.Ct.

2954, 57 L.Ed. 2d 973.

In **Eddings v. Oklahoma**, 455 U.S. 112, 102 S.Ct. 869 (1981) this court applied the rule in **Lockett** to reverse the imposition of the death penalty where the trial court held he could not consider the defendant's violent background in imposing the penalty. The case was remanded to the State Court, "to consider **all relevant mitigating evidence** and weigh it against the evidence of the aggravating circumstances." (emphasis added).

Unlike the Oklahoma statute considered in **Eddings**, the Tennessee statute requires the jury weigh mitigating evidence against aggravating circumstances, and specified certain factors which are mitigating, including that the defendant has no significant history of prior criminal activity and there is no proof in the record that the defendant had any significant prior criminal record. Nonetheless, the statute, as interpreted by the Tennessee Supreme Court, permitted imposition of the sentence of death by a jury which was not charged to consider this statutory factor in mitigation.

Likewise, in excluding additional proof of the events surrounding the offense unless the proof relates to a specific statutorily defined circumstance, the Tennessee statute, "prevents the sentencers in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proferred in mitigation." **Lockett v. Ohio**, 438 U.S. 602, 604 98 S.Ct. 2954, 2964, 2965 (1978).

Furthermore, the Tennessee Supreme Court has clearly stated that the statutory scheme excludes from a jury's consideration non-statutory mitigating factors, holding:

"Therefore, we hold that the only manda-

tory instructions with respect to mitigating circumstances are that those statutory circumstances which are raised by the evidence shall be expressly charged, and the jury must be told that they shall weigh and consider any other facts or circumstances that are raised by the evidence that they find to be mitigating circumstances, in making the determination of which circumstances, aggravating or mitigating, outweigh the other."

The key element of a constitutional scheme for capital punishment is providing adequate guidance regarding factors about the crime and the defendant that the state, representing organized society, deems particularly relevant to the sentencing decision. **Gregg v. Georgia**, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In charging the jury to consider, "any factor or circumstances that you find is mitigating," the sentencer is permitted to impose the sentence of death without the guidance required by this court under **Gregg v. Georgia, supra**, and its progeny.

In **Caldwell v. Mississippi,** ____ U.S. ____, 105 S.Ct. 2633 (1985); this Court made a strong statement for the requirement that a constitutional sentencing scheme must clearly inform the jury of its responsibility. The misleading nature of the Tennessee statute violates the fundamental constitutional requirement that a sentence give mitigating weight to all aspects of a defendant's character, record, and circumstances of the crime, and, thereby, the statute creates a risk of arbitrary imposition of this ultimate sanction.

As Justice Marshall, joined by Justice Brennan, wrote in explaining his desire to grant certiorari to review the constitutionality of the Tennessee

statute on an application for Writ of Certiorari in **Teague,** ____ U.S. ____, 105 S.Ct. 3538, 3539 (1985):

> "Tennessee's statute appears to write less quantifiable mitigating factors such as the desire to render mercy, out of the sentencing proceeding, because the statute is likely to mislead sentencing juries into believing that only mitigating factors they can label and weigh against aggravating ones can be properly considered, I would grant certiorari to review the statute's constitionality."

The Tennessee statutory scheme by precluding from the sentencer's consideration certain mitigating factors is incompatible with the "need for reliability in determination that death would be the appropriate punishment in a specific case." **Woodson v. North Carolina**, 428 U.S. 280 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

The charge in the instant case not only failed to direct jurors to consider mitigating factors set forth by the Tennessee statute, but it also mislead them as to what factors would be considered "mitigating."

Therefore, the death sentence imposed on CHARLES EDWARD HARTMAN violates his constitutional rights secured by the Eighth and Fourteenth Amendments.

Respectfully submitted,

Dale Quillen

DALE QUILLEN
Attorney for defendant

CERTIFICATE OF SERVICE

I certify that I have forwarded a copy of the foregoing Petition for Writ of Certiorari to Mr. W.J. Michael Cody, Attorney General for the State of Tennessee, this 13th day of March, 1986.

Dale Quillen

APPENDIX

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	**For Publication**
	)	
Appellee	)	Oct. 28, 1985
	)	
		Montgomery Criminal
	)	
VS	)	Honorable John H. Peay
	)	
		Judge
	)	
CHARLES EDWARD HARTMAN,	)	
	)	
Appellant	)	

For Appellee:

W.J. Michael Cody
Attorney General
& Reporter
Nashville, Tennessee

Kymberly Lynn Anne
Hattaway
Assistant Attorney
General
Nashville, Tennessee

For Appellant:

Dale Quillen
Attorney-at-Law
Nashville, Tennessee

Lucinda Smith Weaver
Attorney-at-Law
Nashville, Tennessee

OPINION

CONVICTION: AFFIRMED
SENTENCE: AFFIRMED

WM. H.D. Fones, J.

OPINION

This is a direct appeal of a death penalty case. Defendant was convicted of first degree murder in the perpetration of kidnapping, and sentenced to death upon the jury's finding of three aggravating circumstances, to-wit: the murder was especially heinous, atrocious or cruel; it was committed while defendant was engaged in kidnapping; and it was committed while the defendant was in lawful custody, etc.[1]

I.

The victim was Kathy Nishiyama, age sixteen, who lived with her parents on Charlemagne Street, near its intersection with Highway 41A in Clarksville, Tennessee.[2] She disappeared on November 16, 1981, en route from David Lin's home to her home, a drive of approximately thirty minutes. Kathy and David had been dating for more than six months, and had planned to marry when they graduated from high school. She left the Lin residence about eight thirty p.m. David telephoned the Nishiyama residence about nine thirty p.m., and after two subsequent calls to learn whether or not she had arrived, he left his residence and began to search for her.

He found her 1978 Mustang about eleven p.m. in the parking lot of the Church of God on Lafayette Street, near its intersection with Highway 41A. The car was locked, covered with dew, and the muffler

---

[1] T.C.A. §39-2-203(i) subsections 5, 7 and 8.

[2] A sketch of the relative locations of places where events significant to this case occurred, is attached as an appendix to this opinion.

and engine were cold. Her disappearance remained a mystery, despite massive searches, until March the first, 1982.

Near the end of February 1982, James Spicer, a thirty year veteran with the Tennessee Highway Department, had a crew cleaning up litter along Highway 49 between Charlotte and Erin. He found Kathy's purse down an embankment too steep to mow, about thirty feet beyond the guard rail along the northerly side of Highway 49 in Houston County. A few days later, the residents of a trailer home near Highway 49, in a sparsely settled area, a few miles toward Erin from the place Kathy's purse was found, called the Houston County Sherriff's Department and asked that they investigate something they had found in their yard. It was a human skull, identified by Dr. Marvin Bass, Chairman of the Department of Anthropology at the University of Tennessee, and the forensic anthropologist for the State of Tennessee, as that of Kathy Nishiyama. The area was search- and her upper jaw bones and upper teeth were found, and from her dental chart and an x-ray of Kathy's skull, Dr. Bass was able to make a positive identification that such of the skeletal remains as were found were those of Kathy Nishiyama. Her bones and hair and clothes were scattered over a wide area of remote woods, but near an old road used to haul timber many years ago. Many of her bones exhibited evidence of dog tooth marks, according to Dr. Bass. He testified that the skull had been fractured by four separate blows and identified a blow over her right ear that caused a fracture that extended into the back of her skull, as the cause of death.

Most of Kathy's clothes and two-thirds of a tooth that Dr. Bass opined was knocked out by one of the four blows to Kathy's head were found

near two trees that had markings in the bark, near the face of each. The Sheriff of Houston County, who was also an experienced timbercutter and woodsman, identified the two trees, standing approximately eight feet apart. On cross examination, the sheriff said the markings in the bark of the two trees could have been caused by someone being tied between the two trees, and that the markings were made after the growing season of 1981 had ended, and were four to six months or less in age.

Defendant Hartman, although convicted of an offense calling for time in the State Penitentiary, was serving that sentence in the Dickson County Jail, at Charlotte, where he had the status of trusty. He worked on patrol cars assigned to the sheriff's office and there was evidence that he performed other work for the sheriff and Deputy Carroll Fizer. It was shown that Deputy Fizer used Dickson County Sheriff's patrol car number five most of the time; that it was a 1978 Plymouth, white with green stripes, gold stars on the front doors, a heavy wire screen between the front seat and the back seat; that the rear doors could not be opened, nor the rear windows rolled down from the inside; that it had a full blue light bar across the roof. The evidence also revealed that the Montgomery County Sheriff's Office had no Plymouths at that time; that all of its patrol cars were Chevrolet Malibu's, although they were also white with some green trim, similar to all county patrol cars in the State of Tennessee.

On November 16, 1981, at approximately 6:00 P.M., Deputy Fizer, apparently with the knowledge of Sheriff Doyle Wall, turned over custody of car number five to defendant at a tobacco barn near Fizer's residence, with instructions to return to the Dick-

son County Jail at Charlotte. Defendant did not arrive at the jail in Charlotte until 3:30 a.m., or later, on November 17, 1981.

Richard Owen Hughes lives on Jarmon Hollow Road in Palmyra. On November 16, 1981, he left work at the coca-cola company at 6:00 p.m. and was on his way home on Highway 49, when he passed a patrol car that later followed him for about four miles. After he turned onto Jarmon Hollow Road, the patrol car turned on its blue lights, and Hughes pulled over, stopped, got out of his car and walked back to the patrol car. The driver of the patrol car first asked to see his license, then said he did not need to see it, and that he needed directions to get back to Dickson County.

Terry Taylor crossed the Cumberland River at Cumberland City about 6:00 p.m. on November 16, 1981. He drove to Palmyra on Highway 149, stopped at a friend's house for twenty to twenty-five minutes. He then headed toward Clarksville on Highway 149. About six miles from Clarksville he observed the headlights of a vehicle overtaking him rapidly, and after they crossed the ridge, blue lights were turned on, and he pulled off the road. After waiting several minutes he got out of his jeep and walked back to the patrol car with his driver's license in his hand. The driver of the patrol car saw his driver's license, but told Taylor that was not the reason he stopped him; that he was from Dickson County, was on a "big drug bust," and had gotten lost and wanted to know how to get back to Dickson County. Taylor instructed him where to turn to get on Highway 13, and then Highway 48 to Dickson County. Both proceeded towards Clarksville on Highway 149, but Taylor saw a friend in a yard along the way and stopped to chat for five or six minutes. When Taylor reached the Hilltop Market he saw the patrol

car sitting at the edge of the parking lot. He pulled in behind him and the driver got out and asked if they were at the intersection where he should turn. Taylor responded that it was the next intersection where he should take a right turn.

At trial, Taylor positively identified the driver of the patrol car that stopped him and that he conversed with at the Hilltop Market as defendant Hartman, and identified the patrol car as a white Plymouth with green stripes. He testified that the driver was not wearing the uniform of a police officer, that his shirt and pants were army-type work clothes; that the driver said he was late and had to hurry back to Dickson County; that it was after seven p.m. when defendant drove away from the Hilltop Market towards Clarksville and Highway 13. Taylor also testified that forty-five minutes or more after leaving the Hilltop Market he telephoned the Montgomery County Sheriff's Office and reported that he had been stopped by a patrol car driven by a person not in uniform, who said he was from Dickson County and was lost; that he described the car and told the Montgomery County officer that he didn't think the driver of the patrol car that stopped him was an officer and didn't think he should be stopping people.

Sergeant Nelson confirmed that he received the call from Taylor at approximately 8:30 p.m. He testified that he proceeded to ascertain the location of the three Montgomery County patrol cars that were out at that time, and after locating them he contacted Stewart, Houston, and Dickson Counties to determine if any county had a missing patrol car and received negative responses. However, he further testified that at 11:00 p.m. he put out a bulletin that Dickson County had reported a missing patrol car described as a four-door 1978 Plymouth, white

with green stripes and full blue light bar across the roof and a missing trusty, identified as Eddie Wayne Hartman, white male, born April 25, 1958, five foot, eight inches in height, one hundred fifty pounds, blue eyes, brown hair and fair complexion.

Betty Diane Smith lived in Palmyra, had picked up her daughter after completion of her baton lesson at Austin Peay Armory a little after 7:00 p.m. on November 16, 1981, and drove to the Sack 'N' Pack Market for gas. She turned onto the road beside the Sack 'N' Pack without giving a turn signal, looked to her left, and saw a policeman sitting there, and remarked to her daughter that she was going to get a ticket. But, as she was pumping gas, the patrol car crossed the street to a fish restaurant and made a circle in the parking lot. Mrs. Smith left the Sack 'n' Pack for Palmyra, and she noticed headlights behind her as she passed the Hilltop Market on Highway 149. That vehicle followed her for eight or nine miles and as she crossed the bridge near Hematite Road, "the police lights went on." Mrs. Smith testified that she was "alarmed" when the driver of the police car came to her car window and she observed he had long hair, was not in uniform, and had no badges. She asked him if he was the "same cop that was sitting up at the Sack 'N' Pack," and he responded affirmatively with a quiver in his voice. She asked why he had stopped her and he responded that there had been a hit and run in front of the Golden Cue, "that they radioed him and gave him a car of my description, and told him to follow me to see if I would run from him." He asked for her driver's license, took it to the patrol car, was gone "quite a while" but returned the license and allowed Mrs. Smith and her daughter to leave. Mrs. Smith testified that he shined his flashlight on her daughter the entire time he was at the window

of the car. In March of 1982, she was watching a newscast and recognized a picture of defendant Hartman as the man in the patrol car who had stopped her on November 16, on Highway 149. She positively identified him at trial as that person.

Walter Allen DeShields, Jr. worked at Grandma's Market between the hours of six and nine p.m. He testified that on November 16, 1981, a patrol car pulled up to one of the gas pumps, bought five dollars worth of gas, and drove off. He identified the patrol car as like a photograph of Dickson County Sheriff's car number five and he also observed that it had a screen between the front and the back seats. Within a few days after November 16, 1981, men in the same kind of patrol car, who identified themselves as being from Dickson County, came to Grandma's Market and asked him if he had sold gas to someone driving a Dickson County patrol car on the night of November 16, 1981, to which he responded affirmatively.

Carol Leigh Estes lives in Clarksville three minutes driving time north of Highway 41A. She left her home about 9:00 p.m. on November 16, 1981, to go to Krogers. As she passed Lafayette Road on Highway 41A she saw a police car with flashing blue lights that was stopped on the right side of Lafayette Road, close behind a smaller car "right in front of the church."

Jackie Ross Jackson lives in Clarksville not far from the intersection of Lafayette Road and Highway 41A. He was on his way home, and when he turned on Lafayette Road he saw a "county police car" stopped behind a brown car. Neither car had lights on, and he observed a man of normal height and weight with shoulder length hair standing beside the brown car. He didn't pay much attention and did not know the time except that it

was before 10:00 p.m. on November 16, 1981.

About 9:15 p.m. on November 16, 1981, Detective Roger Meckley of the Clarksville Police Department observed a county patrol car "coming into town from 48/13," driven by a white male with shoulder length brown hair, wearing a green jacket. Fifteen minutes later he saw the same patrol car pass, headed in the opposite direction out of town on Highways 48/13. Meckley's friend, Danny Wayne Bryant, was in the car with the detective when the out-of-county Plymouth patrol car came by going out of town.

Proof was adduced that there was no record that any Montgomery County officer had stopped vehicles in the area that the Dickson County patrol car was seen stopping vehicles and that all Montgomery County officers that were on patrol that evening were in uniform.

On November 23, 1981, seven days after Kathy disappeared, FBI agent Cox went to the Dickson County Jail and interviewed defendant. He advised defendant that he was assisting the Clarksville and Montgomery County officers in the investigation of the disappearance of Kathy Nishiyama; that information had been received that defendant was seen driving a patrol car in the Cumberland Heights section of Montgomery County.

Defendant told Cox that he was at a tobacco barn with Deputy Sheriff Carroll Fizer on November 16, and that about 6:00 p.m., Fizer turned the patrol car over to him and instructed him to return to the Dickson County Jail at Charlotte; that he knew that Willie Herrell was wanted by the police and it might help him get released earlier if he could locate Herrell, so he drove by Herrell's house, but did not see his automobile and did not stop to inquire; that he then became lost and ended up in Palmyra,

where he used the patrol car lights to stop a car driven by a "boy" and asked for directions; that he stopped another car, also asked the driver for directions, and followed that car to Highway 48. Defendant told Cox that he realized he had been gone a long time and needed an explanation for being late, so he drove the patrol car in Big Barton Creek near Stayton Road, got stuck, and could not get the patrol car out of the creek; that he walked several miles to a residence where no one was home, and later walked to another residence where they had no telephone—but eventually that Willie Herrell arrived in a white van and pulled him out of the creek; that he returned to Charlotte about 3:30 a.m.

Kenneth Atkins was Assistant District Attorney of Dickson County in 1981, and learned of the missing patrol car episode in mid-December of that year. He tape recorded an interview of defendant and had it transcribed. Atkins gave defendant **Miranda** warnings. Defendant told Atkins that he had told Sheriff Wall and the FBI man everything he did that night, and Sheriff Wall had checked out his story. Although a number of details were different, in substance the statement defendant gave Atkins was the same as that given the FBI agent earlier.

Willie Herrell testified that he was arrested by Sheriff Wall and Deputy Fizer on November 23, 1981; that they had defendant in the patrol car with them at the time of the arrest; that he was driven to a creek and asked if he pulled a patrol car that defendant was driving out of that creek. Herrell testified that he had not been down that road to the creek in years, prior to the day of his arrest, had not seen defendant for six to eight months prior thereto, and did not pull him out of the creek; that the Sheriff and his deputy tried to get him to say he had pulled defendant out of the creek, but he

refused to do so.

Several officers of the Dickson County Sheriff's Office testified that they saw a substance they believed to be blood on the right rear of patrol car number five after defendant returned that car to the jail at Charlotte. Patrol car number five was not processed for evidence relevant to the murder of the victim until March 1982, and at that time nothing was found.

Raven "Snake" Frazier testified that he became acquainted with defendant at the state penitentiary and related a number of incriminating statements that defendant made to him. According to Frazier, defendant told him that he "put the lights" on the girl, told her that there was a sickness in her family, to lock her car and come with him; that he got "it" in the back seat and that it was so good that he took her out of the car, killed her and did it again; that she was not the angel that her boyfriend thought she was; that she "had had it one or more, two or three times."

Defendant presented witnesses who testified that Frazier would do anything to secure early release from the penitentiary and that he was an habitual liar. A former District Attorney General testified about other attempts by Frazier to supply information in exchange for favorable treatment.

II.

Defendant contends that the evidence is insufficient to establish the guilt of defendant beyond a reasonable doubt.

The evidence in this case unerringly places defendant in the location from which Kathy disappeared, at the time she disappeared, with a demonstrated disposition for stopping motorists with the "blue lights" of the patrol car and a clear implication

that, in the current vernacular, he was "looking for some action." From the testimony of Carol Estes and Jackie Jackson the jury could have found that defendant stopped Kathy across the street from the church where her car was found. His statements of his actions between 6:00 p.m. and 3:30 a.m., on November 16-17, 1981, leave ample time for the kidnapping and murder of the victim. His excuses of being lost and deliberately driving into the creek to account to the sheriff for his extended absence simply do not fill the hours between 9:30 p.m. and 3:30 a.m. and stand in this record without corroboration that has probative value.

We find that the evidence of defendant's guilt satisfied the standard prescribed in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781 (1979), and T.R.A.P. 13(e).

III.

Defendant contends it was error to deny his motion for a change of venue. He asserted in support of his motion, the content and extend of pretrial publicity. Defendant's brief in this Court simply cites us the seventeen factors listed in **State v. Hoover**, 594 S.W.2d 743 (Tenn. Crim. App. 1979), to be considered where pre-trial publicity provides the ground for a change of venue, and asserts that numbers one, two, three, four, five, twelve, thirteen, fourteen and fifteen are the key factors in this case. In the trial court defendant introduced over twenty articles from the **Clarksville Leaf Chronicle** about the case, most of which appeared in that newspaper in 1982. The trial of this case began on May 9, 1983, and the prospective jurors were called and examined one at a time, out of the presence of all other prospective jurors, and the trial judge gave preliminary instructions that the examination of a

prospective juror was not to be discussed with the other jurors or prospective jurors. The court excused all jurors whose opinion was to any extent affected by newspaper or television reports about the case.

Our review of the voir dire reveals that the jury selection procedure was carefully conducted by the trial judge and that a fair and impartial jury was selected without difficulty. We have carefully examined the defendant's proof in support of the factors asserted by defendant to be significant in this case, and we find that the trial judge did not abuse his discretion in denying a change of venue. **See Rippy v. State**, 550 S.W.2d 636 (Tenn. 1977).

IV.

Defendant contends that reversible error was committed by the prosecution's withholding of exculpatory evidence.

Nancy Liehr gave a statement to a Montgomery County officer and a T.B.I. agent prior to trial that she believed she saw Kathy driving north on Highway 41A, at approximately nine-thirty on November 16, 1981. She was subpoenaed by the State but not called as a witness to testify at trial. Defendant called her as a witness at the sentencing hearing and sought to use her testimony in support of a non-statutory circumstance, to-wit: his innocence. She testified out of the presence of the jury and there was a lack of certainty in her testimony with respect to the date she saw a girl that she believed to be Kathy Nishiyama.

The State had furnished defendant with a transcript of a statement by Jackie Ross Jackson, but it was discovered that two pages were missing, and those pages contained Jackson's reference to the patrol car that he saw near the church as a **Mont-**

gomery County patrol car. Defendant claims that that statement was inconsistent with Jackson's testimony at trial where he said that it was a green and white county patrol car, as distinguished from a city patrol car, which he knew to be blue and white. It appears that the omission of the two pages may have been negligent rather than intentional, but in any event, defendant had the benefit of the two missing pages when Jackson testified, and fully cross-examined him on the description of the patrol car, and played to the jury the tape recording from which the transcript was made.

Defendant claims that the State withheld a statement by Willie Herrell to Roger Sanker, a criminal investigator for Dickson County, that he had pulled defendant out of a creek about two a.m. on the night of the crime. Our reading of the record discloses that Sanker testified that Herrell told him that he was too drunk to remember whether he pulled a car from the creek.

Robert Rye orally reported to a Montgomery County detective and a Clarksville officer that he had seen a girl matching Kathy Nishiyama's description walking across a field. As a result of those reports, two searches were made of the area of the sighting and nothing relevant to this crime was found.

In **United States v. Agurs**, 427 U.S. 97, 96 S.Ct. 2392 (1976), the Supreme Court dealt with the issue of whether the prosecutor has a constitutional duty to volunteer exculpatory matter to the defense, and if so what standard of materiality gives rise to that duty. After noting that unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside, and absent a constitutional violation, there was no breach of the prosecutor's constitutional

duty to disclose, the Supreme Court continued as follows:

> Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure. But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.

Id. at 108, 96 S.Ct. at 2399-400.

The Court further reasoned that the question of whether defendant has been denied a fair trial depended upon the materiality of the suppressed evidence and then articulated the standard for determining materiality as follows:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of

relatively minor importance might be sufficient to create a reasonable doubt.

Id. at 112-113, 96 S.Ct. at 2401-02.

The omission of two pages of Jackson's statement wherein he identified the patrol car as a Montgomery County patrol car is not subject to this test because it was fully available to defendant at trial.

After carefully evaluating the suppression of the evidence Nancy Liehr revealed to officers, that was not obtained by defendant, the neutral statement of Herrell, and the questionalbe sighting by Rye; in the context of the entire record, it is our opinion that the omitted evidence does not create a reasonable doubt of guilt of defendant and would not have affected the outcome of the trial.

V.

Defendant contends that the testimony of Jackie Ross Jackson should have been suppressed because he was subjected to hypnosis prior to trial.

The trial judge required the State to give defendant the two statements made by Jackson before the hypnosis and the statement made by Jackson during hypnosis. The trial judge restricted Jackson's testimony before the jury to the facts he had related in his pre-hypnosis statements and did not allow any testimony as to the facts elicited only during hypnosis. We find no merit in defendant's assertion that the requirements of **Glebock v. State**, 616 S.W.2d 897 (Tenn. Crim. App. 1981), were not met.

Defendant again places great emphasis on the fact that two pages of the statement of Jackson were missing wherein he referred to the patrol car as a Montgomery County patrol car. Jackson explained that it was a green and white patrol car which he

automatically assumed was a Montgomery County patrol car because it was in Montgomery County and he knew it was not a Clarksville city police car, which would be blue and white. The record establishes that both Montgomery and Dickson County patrol cars are white with green stripes or trim and in 1981 were principally distinguishable by the fact that Dickson County's were Plymouths and Montgomery County's were Chevy Malibu's, a distinction that would not be readily apparent to most observers. Also, when the driver of a patrol car stops another vehicle, observers assume, as Jackson did, that legitimate police business is involved, and Montgomery County officers and jurisdiction at the place Jackson saw defendant.

VI.

Defendant says that he was denied a fair trial by numerous instances of prosecutorial misconduct.

Defendant charges the prosecution with improperly stating that, "Well, I want the truth to come out," implying that defendant was hiding the truth, and was involved in a cover-up of his guilt in conspiracy with officers from Dickson County.

The record does not support defendant's assertion that the prosecution stated during the testimony of David Lin and Ray Jackson that he wanted the truth to come out.

Complaint is made because the prosecutor asked Ray Jackson "will you tell why you are no longer a deputy sheriff?" An indictment was pending against Jackson and it was clearly improper to attempt to question the defendant's witness about the indictment. However, the question was innocuously phrased, the judge promptly sustained defendant's objection and the jury was not made aware of the fact that there was a pending indictment. This error

resulted in no prejudice to defendant, was insignificant and harmless.

The prosecutor referred in his opening statement to the conspicious absence of Dickson County officers, and defendant asserts that he was implying that the defendant was hiding information from the jury. We do not think that the prosecutor's veiled and ambigious reference to the role of the Dickson County officers implied defendant was hiding information from the jury. The most obvious implication, if any, was simply that the officers who put defendant in custody of a sheriff's patrol car on the night of November 16, 1981, were embarrassed, or negligent and would not be available to testify. During the trial the jury also learned that Sheriff Wall and Deputy Frizer were no longer with the Dickson County Sheriff's office and that a civil suit was pending against them involving the events of November 16, 1981.

The prosecution made an effort to elicit testimony about the operation of the Dickson County Sheriff's office, and matters having political overtones, and explained its theory of admissibility outside the presence of the jury, but the trial judge rejected the prosecution's theory of admissibility and did not allow any irrelevant evidence on that subject to reach the jury.

We find no merit to any of defendant's claims that the improper conduct of the prosecution denied him a fair trial.

VII.

Defense counsel asserts that the trial judge entered two orders that limited his preparation for trial to the prejudice of defendant. It is not clear which order defendant relies upon with respect to the prohibition of witnesses from giving depositions in the civil case brought by Ralph Nishiyama

because, as in many instances in defendant's brief, there is no citation to the record as is required by the rules. However, it is clear that there were no restrictions ordered that encumbered or deferred defendant's preparation for the criminal trial. Orders with respect to the civil trial had no effect whatever upon counsel's preparation for the defense of defendant. Counsel's assertion that the order in regard to the civil case foreclosed his access to the exculpatory evidence of Nancy Liehr is totally without foundation.

With respect to the second order, defendant asserts that he was "prohibited...from informing potential witnesses the reason for pre-trial interrogation, or mentioning to potential witnesses that the defendant had passed a polygraph test." Again there was no citation to the record. Our search of the record discloses that the restrictions upon all counsel with respect to polygraph examination and the results thereof were discussed at a hearing on April 21, 1983. The trial court had issued a gag order theretofore that simply tracked the language of the Code of Professional Responsibility, prohibiting all the attorneys from discussing with members of the public or representatives of the media any of the facts of the case. The prosecution had filed a motion on April 11, 1983, asserting that defense counsel had in "extrajudicial contacts" referred to polygraph examinations given to witnesses and defendant, in violation of the gag order, supported by affidavits. As a result of the hearing the Court simply added to the gag order an explicit prohibition with respect to discussing polygraph tests or results with members of the public. The trial judge expressed apprehension that such discussion could have an effect upon prospective jurors. At the same time, the trial judge ordered

counsel not to mention at trial that a polygraph test had been administered or what the results were. Defendant does not question the inadmissibility of polygraph tests and we find that the trial judge's orders with respect to polygraph tests were proper and free of error.

VIII.

Defendant says he was denied a fair trial by the recall of Ralph Nishiyama, the victim's father, to "clarify and explain the testimony of Officer Oakes."

Kathy's father, Ralph, testified that her purse was not in the car when it was found. Then Officer Oakes, the first policeman to arrive on the scene, testified he saw a brown purse resembling Kathy's on the floorboard of the car. Over objection, the State recalled Mr. Nishiyama, who had heard Oakes testify, to testify that Kathy's brown beret had been lying in that part of the car. Permitting a witness to be recalled is a decision resting in the sound discretion of the trial judge. **Lillard v. State**, 528 S.W.2d 207, 212 (Tenn. Crim. App. 1975). Likewise, admitting the testimony of a witness who has testified and then been allowed to remain in court and hear other testimony is a matter within the trial court's discretion. **See Miller v. State**, 520 S.W.2d 729, 735 (Tenn. 1975); **Bryant v. State**, 503 S.W.2d 955, 959 (Tenn. Crim. App. 1973). There is no merit to this issue.

IX.

Defendant asserts that the trial judge improperly limited his cross examination on the witness Raven Frazier. He says that he was not allowed to pursue questions bearing upon Frazier's credibility that were raised at a previous trial wherein Frazier's "character had been accused." Our examination of

the record reveals that the trial judge refused to allow defendant's counsel to explore the argument of the prosecution in the prior case reflecting the views of the district attorney on the question of Raven's credibility. It is hard to conjure a more irrelevant source of evidence than what a lawyer had to say, in argument, at a prior trial. There was no error in the trial judge's action in so limiting the cross examination of a witness on a defendant's credibility.

Defendant also complains that the trial court refused to direct Frazier to answer questions in the affirmative or negative, allowing him to answer more than twenty questions, "not to my knowledge." Defense counsel never requested that the trial judge so instruct the witness and it was not an inappropriate response to most of the questions asked. We do not find that defendant was improperly impeded in his all-out assault on the credibility of Frazier, as the witness' motivation, bias and prejudice were fully presented to the jury.

X.

Defendant asserts that he was prejudiced by the trial judge's denial of his pre-trial motion to require the State to provide him with a copy of statements allegedly made by the defendant to TBI agents Fortner and R.O. Rivera, at the time a polygraph examination of defendant was conducted.

This motion was heard on April 6, 1983, at which time the prosecution denied that it had such a statement or statements. The trial judge directed the Attorney General to contact Fortner and Rivera, ascertain whether signed statements had been made by defendant, and if so he was directed to furnish same to counsel for defendant. As a result of a subsequent discussion at trial, the court ordered

that any statement of defendant made in connection with the polygraph test need not be furnished counsel, but if such a statement existed, the Attorney General should deliver it to the Court, to be sealed and included in the record on appeal. There is included in the record a sealed file with respect to a polygraph examination of one of the trial witnesses in the case, provided by Rivera but no file with respect to such an examination of defendant. We conclude that defendant has failed to show that such a file exists with respect to any statement made by defendant and this issue has no merit.

XI.

Defendant complains that the State improperly argued certain facts that were not in evidence. However, we find evidentiary support for the arguments that the victim was "duped" into getting into patrol car number five voluntarily, and that she may have lived up to twenty-four hours after being struck in the head. We have examined the remaining complaints about the prosecution's argument alleged to be designed to make the jurors feel that they had a responsibility to the community to impose the death penalty and find no error therein.

XII.

Defendant asserts that the prosecution was guilty of improper conduct at the sentencing hearing in characterizing defense counsel's opening statement as asserting that if the jury voted for the death penalty it would be, "guilty of the same demented, depraved mind of the person that committed this offense." The trial judge properly sustained defendant's objection to that argument. The prosecutor's remarks were an inaccurate interpretation of defense counsel's opening statement which the

jury could easily recognize, and probably were detrimental to the State and beneficial to defendant. In any event, the trial judge's prompt sustaining of defendant's objection was adequate to cure that error which was insignificant in the context of this trial.

XIII.

Defendant contends that the trial judge erred in denying his application for a continuance of the sentencing hearing on the asserted grounds that defendant wanted to obtain expert testimony on the deterrent effect of capital punishment and on the issue of whether defendant's acts indicated depravity of mind.

Defendant failed to show that he had been diligent in seeking such expert testimony, that it would indeed be available, and when, and how defendant would be prejudiced if denied the continuance, which required a showing of the substance, materiality and relevancy of the testimony sought to be produced. Absent satisfactory evidence on those requirements, the trial judge properly exercised his discretion in denying the continuance. We have heretofore held that the deterrent effect of capital punishment is not relevant at the sentencing hearing. **State v. Johnson**, 632 S.W.2d 542 (Tenn. 1982).

XIV.

Defendant asserts that the trial judge was in error in failing to charge the eight mitigating circumstances set forth in T.C.A. §39-2-203(j). Defendant presented no evidence relevant to any one of the eight statutory mitigating circumstances. It is defendant's position that the statute makes it mandatory that the trial judge charge and the jury consider the eight mitigating circumstances ex-

pressed in subsection (j), plus any other mitigating circumstances that are raised by the evidence. The plain language of the statute requires that trial judges instruct the jury to consider any mitigating circumstances which may be raised by the evidence at either the guilt or sentencing hearing, or both. In **State v. Buck**, 670 S.W.2d 600 (Tenn. 1984), we held that it was error to change any statutory mitigating circumstances that were not raised by the evidence at the guilt or sentencing hearing. In **Lockett v. Ohio**, 438 U.S. 586, 98 S.Ct. 2954 (1978), the Court implicitly recognized that only those mitigating circumstances that "the defendant proffers as a basis for a sentence less than death" are appropriate for consideration by the jury. **Id.** at 604, 98 S.Ct. at 2964-65.

Defendant asserts that there was evidence adduced at the guilt phase that defendant had cooperated with the police, and at the sentencing phase of defendant's "family obligations." Defendant contends that the trial court erred in refusing to expressly charge the jury that those factors were mitigating circumstances.

Assuming, without deciding, that there were non-statutory mitigating circumstances raised by the evidence, we find no provision in the death penalty statutes requiring that such factors be expressly charged. The only thing in the statutes relevant to defendant's contention under discussion is that mitigating circumstances are not limited to those expressly listed therein. T.C.A. §39-2-203(j). Accordingly, we have held that the jury may consider any non-statutory mitigating circumstances, on its own initiative, and that there is no requirement that they reveal in their verdict what mitigating circumstances, if any, were considered. **State v. Melson**, 638 S.W.2d 342, 368 (Tenn. 1982). There-

fore, we hold that the only mandatory instructions with respect to mitigating circumstances are that those statutory circumstances which are raised by the evidence shall be expressly charged, and the jury must be told that they shall weigh and consider any other facts or circumstances that are raised by the evidence that they find to be mitigating circumstances, in making the determination of which circumstances, aggravating or mitigating, outweigh the other.

The trial judge's charge, with respect to mitigating circumstances, was as follows:

> "You have now heard all of the evidence to be presented in this trial and the sentencing hearing of this case, including all of the evidence as to whether there were any aggravating circumstances, whether there were any mitigating circumstances, all of which you will carefully weigh and consider.
>
> ...[The three statutory aggravating circumstances were charged.]
>
> In arriving at the punishment, the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include but not be limited to, the following: and that is any fact or circumstance you find is mitigating.
>
> If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any sufficiently substantial mitigating circumstances, the sentence shall be death."

We find that the trial judge's charge in this case met the requirements we hold to be mandatory and there is no merit to defendant's contention on this issue. While the charge did not include the phrase limiting mitigating circumstances to those that are raised by the evidence, that omission was favorable to defendant and he will not be heard to complain of its omission.

XV.

Defendant contends that the evidence was insufficient to invoke the aggravating circumstance that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind. We disagree.

There was evidence that, although bludgeoned three times in the head, one blow knocking out three teeth, the victim may have lived for as long as twenty-four hours during which time she may have been tied between two trees; that defendant raped the victim after fatally wounding her; that the area where the crime was committed and the body left was remote dense woods that no persons other than hunters visited. Both the crude and vicious method used to murder the victim, and the leaving of a dying human being, tied up in an area where animals eventually disposed of her remains, chewed and scattered her bones over a large area, clearly made a jury issue of whether or not those acts met the test of the statutory aggravating circumstance of heinous, cruel or atrocious, involving torture or depravity of mind.

XVI.

Defendant contends that the trial judge erred in refusing to allow him to introduce, at the sentencing hearing, evidence in support of his contention that

he was innocent of the murder. In short, defendant asserted that he was entitled to rely on his alleged innocence as a mitigating circumstance.

The death penalty statute provides that at the sentencing, "evidence may be presented as to any matter that the court deems relevant to punishment. The issue involved at the guilt phase of a bifurcated trial has been decided and is foreclosed if and when the sentencing phase of the trial begins. The trial court correctly held that the testimony tendered by defendant to attempt to convince the jury of his innocence was inadmissible at the sentencing hearing.

XVII.

Defendant asserts that **State v. Melson, supra**, advances the idea that a jury may extend mercy to a defendant and that it follows that the trial judge was in error in failing to include an express charge to that effect. In responding to a preceding issue involving defendant's contentions with respect to the charge on mitigating circumstances, we have made it clear that such a charge would not be required.

XVIII.

Defendant asserts error in the denial of his motion for a new trial on the grounds of newly discovered evidence, to-wit, the testimony of Nancy Liehr and Robert Rye.

Nancy Leihr would have testified that she believed she saw Kathy Nishiyama driving north on Highway 41A at approximately 9:30 p.m. on the night that she disappeared. Defendant did not meet the test of showing that he exercised reasonable diligence prior to the trial to present the testimony of Nancy Liehr that was offered post-trial. Defendant's counsel had had the name, address and telephone

number of Nancy Liehr for approximately five months prior to trial; had made some efforts to reach her himself, and had actually had someone who was assisting him in the defense of this case interview her. However, for some unexplained reason, that investigator did not discover that she would testify that she thought she saw Kathy Nishiyama at 9:30 p.m. on the date of her disappearance.

The second requirement for a new trial, on the basis of newly discovered evidence, is a showing that such evidence is likely to change the result. **State v. Goswick**, 656 S.W.2d 355 (Tenn. 1983). In our opinion a jury would either reconcile Nancy Liehr's date or time of sighting the victim with the more convincing testimony of the witnesses who saw defendant standing beside her car near the church earlier and saw defendant driving south on Highway 48/13 at an earlier time, or simply reject her testimony out-of-hand.

Robert Rye would have testified that one evening between November 20 and November 25, 1981, he saw a young girl that looked like Kathy Nishiyama crossing a field near Tarsus Road in Montgomery County. He did not know Nishiyama, but had seen her picture on television and in the newspaper. It was almost dark and the witness was approximately three hundred yards away, although he would have testified that he was able to see the girl's face through the scope of his rifle. Pretermitting the factor of due diligence with respect to Rye's proffered testimony, we find it would not meet the requirements of the second prong of the two-fold test. Clear and convincing proof was presented of the character, habits and personal circumstances of Kathy Nishiyama, which were wholly inconsistent with the notion that she might run away from home or that she had any motivation for

doing so. In our opinion, Rye's highly questionable identification of Kathy would have been rejected by a jury as irreconcilable with the overwhelming proof in this case.

XIX.

Defendant asserts error in the admission of evidence that he was an inmate of the Dickson County Jail. The short answer to that issue is that he brought it upon himself by converting the county patrol car to his personal use in violation of the instruction of his jailors. His status was an inseparable part of the relevant and material proof in this case, unlike **State v. Scruggs**, 589 S.W.2d 899 (Tenn. 1979), where the probation status of defendant was revealed to the jury under irrelevant circumstances.

XX.

Defendant contends it was error to allow FBI Agent Cox to relate the statement of defendant that was not preceded by **Miranda** warnings. Cox testified that he became involved in the investigation shortly after Kathy disappeared although there was no evidence that a crime had been committed. We have heretofore related the circumstances under which Cox interviewed defendant. We think the admissibility of defendant's statement to Cox turns upon the question of whether or not defendant was **suspected** or **accused** of a crime at the time of Cox's interview. **See Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602 (1966), and **Escobedo v. Illinois**, 378 U.S. 478, 84 S.Ct. 1758 (1964). The interview occurred seven days after Kathy disappeared, and the evidence of murder preceded by kidnapping was not discovered until over three months later. There was no focus upon defendant for the purpose

of eliciting a confession, which is a basic posture that gives rise to a person's right to counsel and **Miranda** warnings. We find that in the totality of the circumstances of the Cox interview, Miranda warnings were not required and there was no error in the admission of Cox's testimony about the statements defendant made on that occasion.

We note that in December, General Akins interviewed defendant, after giving Miranda warnings and in that clearly admissible statement substantially the same version of events was related, but in much greater detail.

XXI.

Defendant contends that the trial judge, as thirteenth juror, should have granted a new trial because his response to a form question on the Rule twelve report reveals that the evidence did not foreclose all doubt respecting defendant's guilt.

Defendant insists that the trial judge's approval of the verdict as thirteenth juror was inconsistent with his negative response to the question on the Rule twelve form, "Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt?" We disagree.

A careful reading of the question reveals that there is no inconsistency. As thirteenth juror the trial judge must find that the evidence was sufficient to find the defendant guilty beyond a reasonable doubt. The question recognizes that the trial judge answering the form has sustained the verdict and thus has found the defendant guilty beyond a reasonable doubt, but asks the judge if the evidence satisfied the higher standard of foreclosing all doubt. There is no merit to this issue.

XXII.

Defendant asserts a number of constitutional issues each of which has been dealt with by this Court in prior opinions and no further discussion thereof is warranted. **See generally State v. McKay and Sample**, 680 S.W.2d 447 (1984); **State v. Austin**, 618 S.W.2d 738 (Tenn. 1981); **State v. Pritchett**, 621 S.W.2d 127 (Tenn. 1981); **Houston v. State**, 593 S.W.2d 267 (Tenn. 1980).

We find no merit to the issues raised by defendant with respect to jury instructions and the denial of special requests for jury instructions. We have carefully considered all of the additional issues presented on appeal and found them to be without merit.

Pursuant to T.C.A. §39-2-302 we have reviewed the sentence of death in this case and are of the opinion that it was neither excessive nor disproportionate to the penalty imposed in similar cases.

The conviction of murder in the first degree and the sentence of death are affirmed. The death sentence will be carried out on the 28th day of January, 1986, unless stayed by appropriate authority.

Wm. H.D. Fones,
Justice

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	
	)	Montgomery Criminal
	)	
v.	)	Hon. John H. Peay,
	)	
	)	Judge
	)	
CHARLES EDWARD HARTMAN,	)	
Appellant.	)	

OPINION CONCURRING IN PART;
DISSENTING IN PART

With respect to the constitutionality of the death penalty, I adhere to the views expressed in my dissenting opinion in **State v. Dicks**, Tenn., 615 S.W.2d 126, 132 (1981); in all other respects I concur in the opinion of the Court.

BROCK, J.

BEST AVAILABLE COPY

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE, Appellee	)	**For Publication** Jan. 13, 1986
VS	)	Montgomery Criminal
CHARLES EDWARD HARTMAN, Appellant	)	

OPINION ON PETITION TO REHEAR

A petition to rehear has been filed by appellant, Charles Edward Hartman, considered by the Court, found to be without merit, and is respectfully denied.

Wm. H.D. Fones,
Justice

Concur:

Cooper, C.J.
Brock, Harbison, Drowota, JJ.